United Overseas Bank (M) Bhd v Leong Pit Tee

HIGH COURT (KUALA TERENGGANU) — CIVIL ACTION NO 22–33 OF 1998
ABDUL KADIR SULAIMAN J
5 MARCH 2000

Civil Procedure *— Appeal — Notice of — Service of — Two clear days before day fixed for hearing of appeal — Adjournment of date of hearing of appeal — Whether 'day fixed for hearing the appeal' means same date as the 'day specified in the notice' — Rules of the High Court 1980 O 56 r 1(2) & (3)*

At the hearing of the appeal of the appellant against the registrar's decision in dismissing its O 14 of the Rules of the High Court 1980 ('the RHC') application to recover the sum guaranteed by the respondent in connection with the granting of an overdraft facility by the appellant to one Leong Yong Hor, the respondent raised a preliminary objection and urged the court to strike out the appeal of the appellant in limine for the reason that the notice of appeal was not served on the respondent two clear days before 'the day fixed for hearing the appeal' as required under O 56 r 1(3) of the RHC.

Held, dismissing the preliminary objection of the respondent:

The purpose of the two day period in O 56 r 1(3) is to ensure that the respondent would have time to prepare its case. If the appellant failed to give notice of the appeal to the respondent within the minimum time period for whatever reason, the respondent cannot be forced to argue the appeal. The respondent is entitled for an adjournment of the date of the hearing of the appeal to enable him to have time to prepare his argument. It is the court's discretion to decide whether an adjournment sought ought to be allowed. In the event that the court exercised its discretion to allow the adjournment, the appellant must in not less than two clear days before that date serve the notice of appeal on the respondent. In the present case, the initial hearing date was fixed on 29 November 1999 but the hearing was subsequently adjourned a number of times, the latest being fixed on 29 January 2000. The appellant served the notice of the appeal on the respondent on 3 January 2000 which was more than two clear days as required by O 56 r 1(3) before the adjourned hearing date on 29 January 2000. This was a good service and in conformity with the requirement of O 56 r 1(3) of the RHC because 'the day fixed for hearing the appeal' appearing in O 56 r 1(3) need not necessarily be the same date as the 'day specified in the notice' appearing in O 56 r 1(2) of the RHC (see pp 412E–F, 414B–D, 415E).

[Bahasa Malaysia summary

Semasa perbicaraan rayuan perayu terhadap keputusan pendaftar di dalam menolak permohonan A 14 Kaedah-Kaedah Mahkamah

Tinggi 1980 ('KMT") untuk mendapatkan kembali jumlah yang dijamin oleh responden berkenaan dengan pemberian kemudahan overdraf oleh perayu kepada Leong Yong Hor, responden telah membangkitkan bantahan awal dan meminta mahkamah untuk menolak rayuan perayu tersebut semasa peringkat awal atas alasan bahawa bahawa notis rayuan tidak disampaikan kepada responden dua hari genap sebelum 'tarikh ditetapkan untuk pendengaran rayuan tersebut' seperti yang diperlukan di bawah A 56 k 1(3) KMT.

Diputuskan, menolak bantahan awal responden:

Tujuan tempoh dua hari di dalam A 56 k 1(3) adalah untuk memastikan bahawa responden mempunyai masa untuk bersedia dengan kesnya. Jika perayu gagal untuk memberikan notis rayuan tersebut kepada responden di dalam tempoh minima untuk apa-apa sebab sekali pun, responden tidak boleh dipaksa untuk bersedia untuk rayuan tersebut. Responden berhak kepada penangguhan tarikh perbicaraan rayuan tersebut untuk membolehkannya mempunyai masa untuk menyediakan hujahannya. Adalah budi bicara mahkamah untuk menentukan sama ada suatu penangguhan yang dipohon itu patut dibenarkan. Jika mahkamah melaksanakan budi bicara dengan membenarkan penangguhan, perayu mestilah tidak kurang dari dua hari genap sebelum tarikh tersebut menyampaikan notis rayuan ke atas responden. Di dalam kes ini, tarikh perbicaraan asal telah ditetapkan pada 29 November 1999 tetapi perbicaraan kemudiannya ditangguhkan banyak kali, yang terakhir adalah pada 29 Januari 2000. Perayu menyampaikan notis rayuan ke atas responden pada 3 Januari 2000 yang merupakan lebih daripada dua hari genap seperti yang diperlukan oleh A 56 k 1(3) sebelum tarikh perbicaraan yang ditangguhkan pada 29 Januari 2000. Ini adalah penyampaian yang baik dan selaras dengan keperluan A 56 k 1(3) KMT kerana 'tarikh yang ditetapkan untuk perbicaraan rayuan tersebut' yang terdapat di dalam A 56 k 1(3) tidak semestinya tarikh yang sama dengan 'tarikh yang ditentukan di dalam notis tersebut' yang terdapat di dalam A 56 k 1(2) KMT (lihat ms 412E–F, 414B–D, 415E).]

Notes

For cases on service of notice of appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 787–842.

Cases referred to

Ooi Chew Seng v Ultratech Sdn Bhd & Ors [1997] 2 MLJ 344 (refd)

Public Feedmill (M) Sdn Bhd (in liquidation) v Hai Yeu Hin [1994] 2 MLJ 34 (refd)

Sykt Pembenaan Raya Sdn Bhd v Langkawi Marble Co Sdn Bhd & Ors [1998] 5 MLJ 202 (refd)

Legislation referred to

Rules of the High Court 1980 O 14, O 56 r 1(2), O 56 r 1(3)

Zamani Mohammad (*Zamani Mohammad & Co*) for the appellant.
Muthumugam (*Balendran Chong & Bodi*) for the respondent.

Abdul Kadir Sulaiman J: This is a decision relating to the preliminary objection raised on behalf of the respondent at the hearing of the appeal of the appellant to the judge in chambers pursuant to O 56 of the Rules of the High Court 1980 ('the RHC'). The decision of the registrar appealed against is over the decision dismissing the O 14 application of the appellant to recover the sum guaranteed by the respondent in connection with the granting of an overdraft facility by the appellant to one Leong Yong Hor. In respect of the appeal process, it is not in dispute that the notice of appeal was issued within time. In the issued notice, the court specified 29 November 1999 being the day the parties in the appeal were required to attend before the judge. However, this attendant date was adjourned from time to time until 29 January 2000 for the reason to be given later.

Before me on 29 January 2000, the counsel for the respondent raised a preliminary objection and urged the court to strike out the appeal of the appellant in limine for the reason that the notice of appeal was not served on the respondent on or before 27 November 1999 so as to comply with the requirement of O 56 r 1(3) of the RHC which requires that the notice of appeal must be served not less than two clear days before 'the day fixed for hearing the appeal'. The contention of the learned counsel for the respondent is that 'the day fixed for hearing the appeal' appearing under O 56 r 1(3) is the 'day specified in the notice' appearing under O 56 r 1(2) which was 29 November 1999. It is again not in dispute that in the present case, the notice of appeal which carried that date was only served on the respondent on 3 January 2000. For such failure, the respondent contends that the appeal of the appellant was not properly brought before the judge. He based his argument on the authority of *Public Feedmill (M) Sdn Bhd (in liquidation) v Hai Yeu Hin* [1994] 2 MLJ 34 which is followed by *Ooi Chew Seng v Ultratech Sdn Bhd & Ors* [1997] 2 MLJ 344.

In *Public Feedmill (M) Sdn Bhd* the date specified in the notice of appeal was 12 October 1992. However, on that date counsel for the plaintiff reported that the notice had not been served and the court adjourned the matter to 8 February 1993 on which date it was again, because of non-service, adjourned to 8 June 1993. It was only on 5 May 1993 that the notice was served on the respondent. VC George J who heard the objection upheld the objection and dismissed the appeal.

At p 39 the learned judge said:

> Order 56 r 1(3), as has been seen, prescribes that service of the notice has to be effected two clear days before that specified day. And as had been seen, this requirement was not met. ...The two adjournments of the date of hearing of the appeal has not the effect of nullifying the notice that has been issued on 13 April and per se does not have the effect of extending the date of service of the notice.

In *Ooi Chew Seng*, the date specified in the notice of appeal upon issue was 29 October 1996. The hearing date was subsequently adjourned to 19 November 1996 at the request of the appellant. The notice was served on the respondent on 16 November 1996. The respondent raised a preliminary objection that the respondent was not served with a copy of the notice two clear days before the date fixed for the hearing of the appeal which date was taken to be 29 October 1996 as specified by the court in the notice issued. The issue before the court was whether the notice of appeal was validly served on the respondent. Nik Hashim JC (as he then was) upheld the preliminary objection and accordingly struck out the appeal of the appellant. At p 350, following the decision in *Public Feedmill (M) Sdn Bhd (in liquidaion)*, he said:

> Order 56 r 1(3) of the RHC prescribes that service of the notice of appeal has to be effected two clear days before the returnable day for hearing the appeal. In this case, whilst the notice was issued as required by the first limb of O 56 r 1(3) within the prescribed five days after the judgment, the requirement of the second limb was not met. ...Accordingly, I rule that the appeal cannot be said to have been brought properly before the court, and as such, on the preliminary objection, the appeal to the judge in chambers is struck off with costs.

However, in *Sykt Pembenaan Raya Sdn Bhd v Langkawi Marble Co Sdn Bhd & Ors* [1998] 5 MLJ 202 the court was again faced with a similar objection coming from the respondent. In that case, the plaintiffs filed a notice of appeal and it was issued in time as provided by O 56 r 1(3) of the RHC. On the day fixed for the hearing of the appeal neither side was present before the court. The defendant was absent because it did not know of the hearing date and the plaintiffs were absent because their solicitor had failed to record the hearing date in the diary. The notice of appeal was thus struck out by the court. Then about four months later, the plaintiffs applied for reinstatement of the appeal. The defendant raised a preliminary objection by arguing that because the piaintiffs had failed to serve the defendant two days before the hearing date as required by O 56 r 1(3), the plaintiffs had therefore not brought an appeal according to the meaning of 'brought' in O 56 r 1(2) of the RHC and hence there was nothing for the court to reinstate. In resolving the matter, Abdul Aziz J in distinguishing *Public Feedmill (M) Sdn Bhd (in liquidaion)* and *Ooi Chew Seng* held the view that the purpose of the two day period in O 56 r 1(3) is to ensure that the respondent would have time to prepare its case. Therefore, it would be wrong to rule that the appeal was not brought and to strike off the appeal when the default pertained to the time of service. He is further of the view that when there is non-compliance with the service time, the question which should arise is whether the court should fix or refuse to fix another hearing date. Fairness to the respondent and the appellant's lack of diligence in serving the notice of appeal would be grounds for refusal.

With respect to my learned brothers in *Public Feedmill (M) Sdn Bhd (in liquidation)* and *Ooi Chew Seng*, I am inclined to share the views expressed by my learned brother in *Sykt Pembenaan Raya Sdn Bhd* when called upon

to decide on the operation of O 56 r 1(2) and (3) of the RHC. I am of the view that once the notice of appeal was properly issued as required by the first limb of O 56 r 1(3), the duty next is on the appellant to have that notice served on the respondent for the purpose of bringing the two parties before the judge in chambers for the hearing of the appeal. A minimum time frame is given by the rule to effect service of the notice of appeal on the respondent. The purpose for that to my mind is to allow the respondent sufficient time to prepare his argument against the appeal on the hearing date before the judge. If the appellant failed to give notice of the appeal to the respondent within the minimum time period for whatever reason, the respondent cannot be forced to argue the appeal. This is what is normally known as short service. The respondent is entitled for an adjournment of the date of the hearing of the appeal to enable him to have sufficient time to prepare his argument. As for the court, it is within its discretion to decide whether an adjournment sought ought to be allowed. If good reason is given by the appellant for the late service of the notice of appeal, an adjournment ought to be allowed. If no good reason is provided, the court may strike out the appeal for lack of diligence on the part of the appellant in prosecuting his appeal. This is a separate exercise altogether to be undertaken by the judge in the making of the decision of either to allow the adjournment or to strike out the appeal. The appellant cannot however, be penalized as a matter of course simply on the ground of short service or non-service of the notice of appeal on the respondent. In the case of non-service of the notice until the date specified by the court in the notice upon the issuance of the notice of appeal under O 56 r 1(2), if the reason provided by the appellant is accepted for the non-service, the hearing of the appeal would have to be adjourned to another date. In such instance, the appellant must in not less than two clear days before that date serve the notice of appeal on the respondent if the hearing of the appeal is to proceed on the adjourned date. In the circumstances, 'the day fixed for hearing the appeal' appearing in O 56 r 1(3) need not necessarily be the same date as the 'day specified in the notice' appearing in O 56 r 1(2) of the RHC.

In the present case before me, upon the issuance of the notice filed on 3 October 1999 by the appellant, the court specified 29 November 1999 as the date for the attendance of the parties before the judge. But on the day specified, the hearing could not take place because the date coincided with a subsequently declared public holiday. So, by a notice dated 14 November 1999 the court informed the solicitors for the appellant that the hearing scheduled for 29 November 1999 was adjourned to 19 December 1999. No similar notice was issued to the respondent as there was no evidence before the court that by then the notice of appeal had been served on the respondent. On 19 December 1999, only the appellant's representative and its counsel appeared for the intended hearing of the appeal. There was still no indication from the counsel that the notice of appeal had or had not been served on the respondent. Realizing that the non-attendance of the respondent was justifiable owing to the absence of the notice for the adjourned hearing being issued to him, the court accordingly adjourned further the said hearing date to 2 January 2000. An appropriate notice for

A the new date of hearing was sent to the respondent, the appellant having been informed of the new date of hearing.

However, on 2 January 2000 again only the appellant's representative and its counsel appeared. The respondent or his counsel was absent. Again there was no information from the counsel that the notice of hearing had or had not been served on the respondent by then. As the evidence of the service of the notice of the adjourned hearing on the respondent was not available before the court, the hearing date of the appeal was again adjourned, this time to 29 January 2000. On this adjourned hearing date both parties appeared being represented by their respective counsel.

It was only on this occasion that the learned counsel for the appellant informed the court that the notice of appeal was only served on the respondent on 3 January 2000 due to an oversight on their part to do so earlier. No doubt the conduct of the counsel for the appellant in not informing the court earlier as to the service or non-service of the notice of appeal upon the respondent as expected of an officer of the court is blameworthy, but the issue before me now is over the validity of the appeal process on the ground that the notice of appeal was not served on the respondent 'not less than two clear days' before 29 November 1999.

Based on the views expressed earlier on the law concerning the operation of O 56 r 1(2) and (3) of the RHC, I dismiss the preliminary objection of the respondent because the service of the notice of appeal on the respondent on 3 January 2000 which was more than the two clear days required by O 56 r 1(3) before the hearing date on 29 January 2000 was a good service and in conformity with the requirement of O 56 r 1(3) of the RHC. This appeal of the appellant was properly before the court. I would, therefore, proceed to hear the appeal on merit.

Preliminary objection of the respondent dismissed.

Reported by Wong Siok Chin